No. 49867-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In Re the ESTATE OF ELMA KANGAS;

DALE KANGAS,
Appellant,

v.

RICHARD KANGAS, Personal Representative,
Respondent.

REPLY BRIEF OF APPELLANT DALE KANGAS

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I. ARGUMENT

The Respondent, Richard Kangas, makes various arguments without support in the record or accompanying case law and therefore the Court of Appeals should not consider these arguments.

When raised on appeal, the court will not consider issues unsupported by citation to authority. *Valente v. Bailey*, 74 Wash.2d 857, 858, 447 P.2d 589 (1968); *Avellaneda v. State*, 167 Wash.App. 474, 485, 273 P.3d 477 (2012). The courts do not consider conclusory arguments. *Joy v. Dep't of Labor & Indus.*, 170 Wash.App. 614, 629, 285 P.3d 187 (2012), *review denied*, 176 Wash.2d 1021, 297 P.3d 708 (2013). Passing treatment of an issue or lack of reasoned argument is insufficient to merit appellate review. *West v. Thurston County*, 168 Wash.App. 162, 187, 275 P.3d 1200 (2012); *Holland v. City of Tacoma*, 90 Wash.App. 533, 538, 954 P.2d 290 (1998).

A. Dale Kangas is the only beneficiary still alive and capable of bringing this necessary challenge.

The first argument Richard proffers should summarily be dismissed.[1] By Richard's own admission, Dale Kangas was appointed to be the Personal Representative of the Estate of John Kangas, *See*

[1] In accordance with court rules and for the sake of symmetry, this brief shall utilize only first names when referring to the parties *See* RAP Rule 10.4(e).

Respondent brief at page 5. As personal representative, Dale is "authorized in his or her own name to maintain and prosecute such actions as pertain to the management and settlement of the estate, and may institute suit to collect any debts due the estate or to recover any property, real or personal, or for trespass of any kind or character." RCW 11.48.010

If Dale is unable to bring a suit on behalf of John, then it would seem no appeal could ever occur in the case at bar no matter what actions occurred to the detriment of John's estate. However, Richard cites no case law or statute to support his position and it therefore should be disposed of summarily. *Valente, Supra.* Dale has the statutory and legal authority to bring this appeal as both a personal representative and as a beneficiary of the estate of John Kangas. Nothing in the record accords a different conclusion.

B. Dale Kangas's issues concerning the reasonableness of the challenged fee are preserved on appeal.

First, as personal representative, Dale properly objected to the fees at the time they were requested. CP at 142-150. The arguments Richard asserts are unpreserved are precisely what formulated the basis for this appeal. *See* Assignments of Error (1) & (2) of Appellants brief pg. 2; *See also* CP at 179-184.

Richard cites *Vigil v. Spokane Cty* and *State v. Spongburgh* concerning his law of the case argument. However, *Vigil* does not support Richard's position for several reasons. First, *Vigil* concerned a claim of implied warranty of habitability from homeowners against a builder and is both legally and factually distinguishable. *Vigil v. Spokane Cty.*, 42 Wash. App. 796, 799, 714 P.2d 692, 694 (1986). Second, *Vigil* explicitly noted that appellants raised their argument for the first time on appeal *Id.* at 797. Dale unambiguously raised his objections in the lower court. CP at 179-184. Third, *State v. Spongurgh* is a criminal case involving the release of grand jury evidence in which it discusses an indictment being dismissed. *State v. Sponburgh*, 84 Wn.2d 203, 208 (1974). *Spongurgh* is not controlling law in the case at bar. Also, there is precedent even in criminal law where preservation of an issue for appeal is not dispositive. *See generally, State v. McFarland*, 127 Wash. 2d 322, 333, 899 P.2d 1251, 1256 (1995) ("The defendant must identify a constitutional error and show how, in the context of the trial, the alleged error actually affected the defendant's rights"). Here, Dale raised his objections at the lower court, and the implications surrounding public policy justify appellate review.

Richard goes on to make passing reference generally concerning settlement agreements, but this argument is underdeveloped and presented via a single footnote. Respondent brief at page 7. The appellate court

should not consider undeveloped arguments which are not properly briefed for review. *Valente, Supra.* In any event, *Plancich* was addressing a final resolution in a class action suit against an automobile insurer and is clearly distinguishable. *Plancich v. Progressive Am. Ins. Co.*, 134 Wn.App. 543, 546 (2006). *Plancich* did not concern a prevailing public policy argument nor do the facts mirror the case at bar. Here, the estate was still open after the agreement signed in 2008. The probate was not closed for another eight years, and three years after the final timber harvest. CP at 93. Richard's continual repetition that this appeal is frivolous is both undeveloped and conclusory in nature. This court should not consider conclusory arguments upon appeal. *Joy, Supra.*

Specifically, Richard has made no argument concerning the years that followed the agreement signed in October of 2008. **Nothing in the record indicates the agreement signed would abrogate Richard's fiduciary duties prospectively and for all time.** The fact the ONDRA agreement is purported as binding upon heirs or assigns does not negate the fact Richard was still obligated to act as a fiduciary from 2008 until the close of probate. *See, Matter of Estate of Larson*, 103 Wash.2d 517, 694 (1985).

At all times, Richard carries his burden of demonstrating his actions in any claimed fee were both reasonable and necessary. *In re*

Merlino's Estate, 48 Wash. 2d 494, 498, 294 P.2d 941, 943 (1956) (*citing In re Peterson's Estate*, 12 Wash. 2d 686, 727, 123 P.2d 733, 752 (1942)). Even if the ONDRA agreement had been written prospectively, the court should find such agreements intrinsically dubious because it would in effect give a personal representative *carte blanche* in acting against the best interest of the estate. This would undermine the statutory duties explicitly spelled out in Washington state law. *See* RCW 11.48.010.

Moreover, Richard's brief is entirely non-responsive to the public policy argument presented on appeal. Richard does not even attempt refutation; rather he predictably attempts to shield his dilatory conduct with a previous written agreement. It is Dale's argument that, under the circumstances, Richard should not be allowed to contract away his obligations as a fiduciary as such an act would constitute a contract with a tendency to do harm. *See*, *Marshall v. Higginson*, 62 Wash.App. 212, 216, 813 P.2d 1275 (1991) (*quoting Golberg v. Sanglier*, 27 Wash.App. 179, 191, 616 P.2d 1239 (1980), *rev'd on other grounds*, 96 Wash.2d 874, 639 P.2d 1347, 647 P.2d 489 (1982)); *See also Makinen v. George*, 19 Wash.2d 340, 354, 142 P.2d 910 (1943).

The timeliness of bringing a contractual defense when it is *void ab initio* and staunchly against public policy is largely immaterial. *See Beroth v. Apollo Coll., Inc.*, 135 Wash. App. 551, 560, 145 P.3d 386, 392 (2006)

("The illegality of a contract may be raised at any time"). A contract that is either illegal or violates public policy is void and unenforceable. *Hammack v. Hammack*, 114 Wash. App. 805, 810–11, 60 P.3d 663, 666 (2003)(*citing Fluke Corp. v. Hartford Accident & Indem. Co.*, 102 Wash.App. 237, 245, 7 P.3d 825 (2000), *aff'd*, 145 Wash.2d 137, 34 P.3d 809 (2001)); *See also*, *Sherwood & Roberts–Yakima, Inc. v. Leach*, 67 Wash.2d 630, 636, 409 P.2d 160 (1965). A contract that "seriously offends law or public policy" is "*void ab initio*" or "null from the beginning" *Helgeson v. City of Marysville*, 75 Wash.App. 174, 180 n. 4, 881 P.2d 1042 (1994) (*citing* Black's Law Dictionary 1574 (6th ed.)). An instrument that is "intimately connected" to an illegal instrument is likewise tainted and unenforceable. *Id.* Additionally, the law governing ONDRA articulates the process is meant to supplement statutory duties, not replace them. "The purpose of RCW 11.96A.220 through 11.96A.250 is to provide a binding nonjudicial procedure to resolve matters through written agreements among the parties interested in the estate or trust. The procedure is supplemental to, and may not derogate from, any other proceeding or provision authorized by statute or the common law." RCW 11.96A.210 (*Emphasis added*). When read in tandem with the responsibilities of a personal representative, the intent of the TEDRA process is not contraindicated by holding the personal representatives to his fiduciary duties.

C. Richard's attempt to factually distinguish cases presented for public policy purposes is unpersuasive and irrelevant.

Richard's approach to rebuttal is unsuccessful in addressing the stasis of the argument at hand. Richard attempts to discredit Dale's argument by making non-responsive factual distinctions while making precisely zero claims against the policy argument presented. Dale provided case law demonstrating the need to reject the underlying agreement for policy reasons; the policy justification still holds. Given the unique factual history of this case, it is unsurprising there is scant case law adjudicating rights in a probate spanning more than two decades. Without citation, Richard affirmatively asserts the Appellate Court should not look to other jurisdictions for guidance. As the facts of this case create a question of first impression in Washington, it is traditional to look to other jurisdictions for information and guidance. *See generally*, *Matter of Welfare of Colyer*, 99 Wash. 2d 114, 119, 660 P.2d 738, 741 (1983) *holding modified by Matter of Guardianship of Hamlin*, 102 Wash. 2d 810, 689 P.2d 1372 (1984); *Kitsap Cty. v. Allstate Ins. Co.*, 136 Wash. 2d 567, 579–80, 964 P.2d 1173, 1179–80 (1998); *In re Testamentary Trust of Desimone*, 180 Wash. App. 1015 (2014); *Meyer v. Burger King Corp.*, 144 Wash. 2d 160, 166–67, 26 P.3d 925, 928–29 (2001). Richard again makes an assertion, without explanation, that other jurisdictions' rules concerning contracting away

fiduciary duties are somehow irrelevant. This conclusory argument should be disregarded. *Joy, Supra.*

However, Washington does follow the common law which is outlined in RCW 4.04.010:

> The common law, so far as it is not inconsistent with the Constitution and laws of the United States, or of the state of Washington nor incompatible with the institutions and condition of society in this state, shall be the rule of decision in all the courts of this state.

Early in Washington State's history, the courts construed RCW 4.04.010 to mean, in the absence of governing statutory provisions, the courts will endeavor to administer justice according to the promptings of reason and common sense, which are the cardinal principles of the common law. *Bernot v. Morrison,* 81 Wash. 538, 544, 143 P. 104 (1914) (citing *Sayward v. Carlson,* 1 Wash. 29, 23 P. 830 (1890)). Washington courts have also construed this statute to permit the adaptation of the common law to address *gaps* in *existing* statutory enactments, providing that the common law may serve to "fill interstices that legislative enactments do not cover." *Dep't of Soc. & Health Servs. v. State Pers. Bd.,* 61 Wash.App. 778, 783–84, 812 P.2d 500 (1991) (*citing* RCW 4.04.010), *cited with approval in Clark County Pub. Util. Dist. No. 1 v. Int'l Bhd. of Elec. Workers,* 150 Wash.2d 237, 245, 76 P.3d 248 (2003). Washington courts have consistently invoked their equity powers and common law

responsibility to respond to the needs of changing realities. *Id.* Fiduciary duties exist both in common law principle and in statutory schema. *In re Heilman's Estate*, 345 N.E.2d 536, 540 (Ill. Ct. App. 1978)).

In the *Estate of Hitchcock*, the appellate court ruled that violation of statutory duties justified overturning the lower court orders due to lack of accounting. *Estate of Hitchcock*, 140 Wn. App. 526, 167 P.3d 1180 (2007). Dale merely seeks to apply the same logic where the duty to account is less explicit. Richard must, in good conscience, be held to a formal standard when he seeks a fee of $60,000. Richard also states several cases are irrelevant without demonstrating how the law is invalid. The case law presented in Dale's brief is still valid case law in the State of Washington. *See Stewart v. Wright*, 147 F. 321(8th Cir. 1906); *Langley v. Devlin*, 95 Wash. 171(1917). Richard tosses out, interestingly enough, his own red herring by attempting to impugn the validity of legal principles by looking to their factual differences. The cases cited were not cited for their factual similarities. It is precisely the point that the facts of this case present their own justification for appeal; shortly, few probates in history exist extending over two decades. The lack of factual similarities in this policy based argument is irrelevant and clearly a distraction from the issues at hand. Richard did not present a single counter to the principled arguments. In fact, Richard does not add any additional case law in his

rebuttal of Dale's public policy arguments. Richard's objections are undeveloped and without merit.

D. The lower court should not be permitted to merely rubber stamp the self-serving declarations of Richard. In doing so, the court abused its discretion.

Next, Richard asserts that ample evidence exists on the record justifying the reasonableness of the fee claimed. Richard's claim is demonstrably false. Nothing in the record justifies the fees claimed other than the bare facts in self-serving declarations by the personal representative who has every incentive to claim they are reasonable. Richard is not a Forestry Manager by profession. The only Forester of record, and a close personal friend of Richard, Gordon Pogorlec provided a two and a half page conclusory affidavit which is woefully insufficient, as was argued at the lower court. CP at 092-094. The effective rate of pay for Richard would amount to $750 dollars an hour for someone who admitted in deposition he only makes $18 an hour in his professional career. CP at 135. Richard attempts to justify his outrageous fee by pointing to the size of the estate. However, this line of reasoning does not follow.

The reasonableness of a fee is not proven by some arbitrary value added to an estate by selling assets at the "optimal time" due to factors that are exclusively the result of a recovered economy and not a result of actions taken by the personal representative. Certainly if the estate assets

had lost value, Richard would not argue his fee should be negatively correlated to the value of the estate. Richard concedes he is not an attorney, or a professional forester for that matter, yet claims an exorbitant fee without demonstrating qualification. Dale is not arguing that Richard should be held to the exact standard of an attorney, however he is rightfully insisting Richard be held to a reasonable standard. In its disposition, the lower court merely rubber stamped the self-serving declarations of the personal representative without any inquiry.

By way of analogy, self-serving declarations are insufficient to create a material dispute of fact in summary judgment proceedings. *Berol v. Berol*, 37 Wash. 2d 380, 381–82, 223 P.2d 1055, 1056 (1950) ("The requirement of clear and satisfactory evidence is not met by the mere self-serving declaration of the spouse claiming the property in question that he acquired it from separate funds and a showing that separate funds were available for that purpose."); *See also Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1059 n.5, 1061 (9th Cir. 2002) (holding that the district court properly disregarded the declaration that included facts beyond the declarant's personal knowledge and did not indicate how she knew the facts to be true); *F.T.C. v. Publ'g Clearing House, Inc.*, 104 F.3d 1168, 1171 (9th Cir. 1997) ("A conclusory, self-serving affidavit, lacking detailed facts and any supporting evidence, is insufficient to create a

genuine issue of material fact."). Summarily, the court abused its discretion by failing to require more than self-serving declarations as proof for a $30,000 professional fee.

Richard also makes the circular argument that Dale presented no expert rebuttal testimony and therefore there is no alternative but to conclude the fee is reasonable. However, this argument is unpersuasive for several reasons. First, the entire justification for the appeal is that Dale was never given an opportunity to present contrarian evidence on the reasonableness of the fee asserted because the court summarily struck his motions objecting to personal representative fees. CP at 179-181. Second, and more critically, respondent clearly attempted procedural gamesmanship by filing a conclusory "expert" affidavit at 3:34 p.m. on October 24th, well after appellant filed his objections in September, and less than a day before the order awarding fees was entered. *Id.*; *See also* CP at 228-229. In essence, Dale had no ability to challenge this surprise expert but for this appeal. This act in and of itself demonstrates the haphazard manner in which the fee has been justified in the case at bar. Dale did not have an opportunity to interview the asserted expert and draw comparisons towards the duties actually performed by Richard. Richard did not own and operate a professional Trust service nor did he operate a bank. Richard dubiously attempted to analogize apples and oranges

without any internal consistency between the two positions. Should the court uphold the lower court ruling, it would set the precedent where a personal representative can merely claim he spent 4,000 hours conducting work and it is acceptable to just take him at his word, to the detriment of all other parties. There is only one single mention of this "4,000 hour" figure, and that is in the declaration of Richard Kangas. CP at 152.

In fact, even this number is inaccurately written as "400 hours over 20 years". *Id.* Effectively, this number has come from thin air and without this appeal would return to the ether, from which it came, forever lost in the penumbra of Richard's claims of reasonability.

Richard did not even attempt to argue that he did not violate the wishes of his father, Wayne Kangas. CP at 140. Richard effectively concedes there is a clear record that he violated his fiduciary duties and undermined the requests of Wayne Kangas, Wayne's attorney, and the attorney for Dale Kangas. CP 139-142. Moreover, Richard concedes the estate was continually not closed even at the request of Dale's attorney. CP at 182-184. Richard also concedes the lower court had no justification to deny objection to the fee claimed for the subsequent eight years following the arbitrated settlement agreement. Appellant brief, pg. 13. Richard concedes that during deposition testimony the most he made in his professional career was $18.74 an hour. CP at 135. The record is

completely devoid of anything demonstrating 4,000 hours of work occurred, let alone whether or not those claimed hours were reasonable, necessary, and compensable under the law. Even in the light most favorable to Richard, the information provided to the court could only justify a fee of approximately $7,700 and that is being extremely generous. CP at 174-176.

Richard attempts characterize Dale's calculations based on supposition, but these calculations are derived from the only information ever provided by Richard. CP 151-176. Richard clearly does not wish to discuss his faithfulness in executing his duties. Rather, he would use the shield of his arbitration from ever having to account for his actions. The only counter argument presented is that he completed the timber harvest before the "due date" but even this argument is mischaracterized before the court. There was no "October 2015" deadline under the terms of the settlement agreement. Respondent Brief page 11. Under the terms of the settlement agreement signed in October of 2008:

> The above merchantable timber ownership shall be evidenced by a timber deed or other equivalent document requiring that the timber be harvested within five (5) years after the date the deed is signed and recorded, subject to a two (2) year extension upon payment of $1,000 per month, on or before the calendar date of the five-year anniversary of recording the deed and the same day each month thereafter until expiration with interest accruing on any unpaid amount at twelve percent (12%) per annum. At the end of the two (2) year period WTD shall have the option of harvesting the timber

> and using reasonable forest management practices, with the obligation to ***timely deliver the net proceeds to the estate of Elma Kangas.*** CP at 209 (*Emphasis Added*).

Clearly, waiting an additional three years to close the probate, after continued request to do so by Dale's counsel, is not the definition of timely. *See generally* CP at 112-131. Richard has not proffered an explanation for the three year delay because frankly there is none.

E. No Fee should be granted on Appeal for Richard Kangas.

As has been thematic in the twenty-one years of this protracted case, Richard puts the cart before the horse. The only reasonably briefed portion of Richard's responsive brief is concerning fees. Once again, Richard wishes to garner the benefits of the estate whilst doing none of the prerequisite work to bear such fruits. This appeal is not only necessary, but morally justified given the fact that two beneficiaries, both Wayne and John Kangas, passed away before realizing the benefit of the estate of Elma Kangas.

Where both sides in probate proceeding advance reasonable, good faith arguments in support of their respective positions, trial court may assess attorney fees against estate, so that all contesting parties bear costs of dispute. *In re Estate of Evans* 181 Wash.App. 436, 326 P.3d 755 (2014). Beneficiaries of an estate are entitled to recover attorney fees from the personal representative of a nonintervention estate, due multiple

breaches of fiduciary duty occur. *In re Estate of Jones* 152 Wash.2d 1, 93 P.3d 147 (2004). The Appellant encourages the court to take a long hard look at what constitutes "proof" of the services rendered when claiming a $60,000 fee. There is nothing nominal about the claimed fee, as Richard would suggest. Based on his own written documents, which again are simply self-serving, it is unfathomable how he reaches the conclusion that he has expended "4,000 hours" in acts that were reasonable and necessary for the estate. The record is unequivocally devoid of any such evidence. Richard should bear the costs of appeal personally.

II. CONCLUSION

Dale Kangas, on behalf of his father John's estate, is asking this court to deny Richard any fee whatsoever. This is clearly justified on the record before the court. Should the court decide any fee is warranted, Dale asks this court to remand the case to the lower court for a hearing to determine the reasonableness of the scant record proffered by Richard Kangas.

Respectfully submitted this 12th day of May, 2017.

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Dale Kangas

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on the below date, I caused delivery, as noted below, of a true and correct copy of the foregoing document to:

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DATED at Olympia, Washington, this 12th day of May, 2017.

Catherine Hitchman

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